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STATE OF WASHINGTON

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Supreme Court No. 80199-1

Court of Appeals No. 57866-9

IN THE SUPREME COURT
OF
THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

and

COMMERCIAL UNDERWRITERS INSURANCE COMPANY,

Respondents,

v.

USF INSURANCE COMPANY,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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ARGUMENT

The Free Assignability of the Right to Tender Facilitates Timely Settlements.

The central question in this case is “whether insurers who settled with an insured on a liability claim and were assigned the insured’s rights may make a late tender of the claim to a non-settling co-insurer and receive the benefit of the late tender rule to maintain an action for contribution against the non-settling insurer.” See, Washington Courts Website, Supreme Court Issues, January Term, 2008.

Mutual of Enumclaw and C.U.I.C. protected their insured by settling the Windsong Homeowner’s claim and avoided the risk of a much higher liability at trial while most other insurers on the risk waited for events to unfold. Settlement was possible because the insured was willing to assign its rights to pursue others for their share. The assignment was required to recoup the over payment Mutual of Enumclaw and C.U.I.C. were required to make, well above their share of the risk, in order to achieve the settlement. Obtaining the right to tender to other insurers is an important element needed to encourage these “pay and chase” settlements.

The ability to Assign contract rights is an essential commercial tool providing for the free alienability of intangible rights. *Calamari & Perillo, Contracts*, 403 (1970). In Washington contract rights may be assigned unless forbidden by statute or unless assignment would violate public policy. *International Commercial Collectors, Inc. v. Mazel Co.*, 48 Wn. App. 712, 716-717, 740 P.2d 363 (1987); *DeWolf & Allen*, 25 *Washington Practice, Contract Law and Practice*, 247 (1998). It is common for insurance rights to be assigned and assignment of them has been specifically approved. *Eg., The Estate of K.O. Jordan v. Hartford Accident & Indemnity Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993). The assignee stands in the shoes of the assignor and has all of the assignor's rights. *Ibid.* The assignee has a direct, rather than derivative, cause of action against the other party to the contract. *Ibid.* The insured's rights after a loss may be assigned despite a no assignment clause in the insurance policy because the insurer's risk is unaffected by the assignment after the loss has occurred. *Public Utility District #1 v. International Insurance Co.*, 124 Wn.2d 789, 800-801, 881 P.2d 1020 (1994). The assignment of post-loss insurance policy rights by the insured to one of its co-insurers is valid and provides the assignee with the insured's

contractual privity with its other co-insurers. *Amazon.com International, Inc. v. American Dynasty Surplus Lines Ins. Co.*, 120 Wn. App. 610, 620, 85 P.3d 974 (2004). The assignment of post-loss rights under an insurance policy is valid when made to a co-insurer. No statute or public policy prohibits this assignment.

One important post-loss right of an insured is the right to tender its defense to its insurers. So long as the insurers' rights are not prejudiced, the tender may be made late, even years after the occurrence of the loss. *Unigard Ins. Co. v. Levin*, 97 Wn. App. 417, 983 P.2d 1155 (1999). An insurer who has received a late tender must not only defend but pay reasonable pre-tender defense costs incurred by its insured so long as the insurer has not been prejudiced. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 29 P.3d 777 (2001). There is no statute or public policy suggesting assignment of the tender right is improper.

To the contrary, public policy forcefully supports the assignment of this right to benefit insureds and third party claimants with timely settlement of claims. The tender right also benefits settling insurers by allowing them to recoup payments greater than their share of the total liability made to achieve settlements in which some liable insurers did not participate. Most importantly timely

settlements in which all insurers participate are encouraged. Any temptation to delay in the hope another insurer might solve the problem is dampened.

Washington public policy supports the settlement of claims by insurers when liability becomes reasonably clear. WAC 284-30-330(6); See, *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Timely settlement provides an economic benefit to the insured and third party claimants and discourages foot dragging by reluctant insurers, a problem that “would be compounded in cases of multiple insurers.” *McRory v. Northern Ins. Co.*, 138 Wn.2d 550, 560, 980 P.2d 736 (1999).

Washington public policy supports reimbursing the insured’s expense of pursuing insurers to compel coverage denied under their policies. *Eg.*, *Olympic Steamship Co. v. Centennial Ins. Co.*, *supra*. Similarly, an insured benefits by receiving a timely settlement in return for the assignment to settling insurers of the right to make that pursuit. The assignment alleviates the insured from the expense and delay of having to fight its own insurer for coverage or payment by passing that problem to the settling insurers. Denying settling insurers the ability to tender would dilute these benefits.

Washington public policy also seeks to avoid unjust enrichment by foot-dragging insurers by rewarding the insured with reimbursement of attorneys fees for pursuing a successful coverage action. *Olympic Steamship Co. v. Centennial Ins. Co.*, *supra*. In addition public policy encourages the shouldering of this burden by settling insurers by allowing assignment of the right to recover *Olympic Steamship* fees from the insured. *Amazon.com International, Inc. v. American Dynasty Surplus Lines Ins. Co.*, *supra*. Similarly, unjust enrichment is avoided by permitting settling insurers to pursue non-settling insurers for subrogation or contribution. See, *Mutual of Enumclaw Ins. Co., v. USF Ins. Co.*, 137 Wn. App. 352, 153 P.3d 877 (2007) and *Sound Built Homes v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 633-635, 72 P.3d 788 (2003) (contribution) and *Truck Ins. Exchange v. Century Indemnity Co.*, 76 Wn. App. 527, 887 P.2d 455 (1995) (subrogation). Preventing free assignability of the right to tender would be contrary to this prevalent public policy.

Washington public policy also is sensitive to providing sufficient insurance coverage for the claims of innocent third parties to the extent fairness to insurers is not compromised. *Oregon Automobile Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-377, 535 P.2d

816 (1975). Although third party claimants have no direct right against insurers, providing sufficient recovery for those who are injured is an important public concern. *Ibid.* The assignability of the right to tender helps assure sufficient insurance proceeds to cover losses.

The ability to assign contract rights is an important tool facilitating commerce. Public policy in Washington places substantial emphasis on obtaining timely and reasonable settlement of insurance claims. The ability to assign insurance rights, including the right to provide a late tender, has a significant impact on the ability to obtain timely settlements in complex cases involving numerous insurers. Impairing an insurer's right to receive assignment of its insured's policy rights will damage the ability to achieve timely settlement, especially of complex claims involving numerous insurers. Mutual of Enumclaw and CUIC should be permitted to pursue their claims against USF.

Respectfully submitted this 7th day of March, 2008.

HACKETT, BEECHER & HART

/s/*

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*Original signature on file

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CERTIFICATE OF SERVICE

I, Linda Voss, declare that on the date noted below I caused to be delivered via ABC Legal Messengers, Inc., a copy of Supplemental Brief of Respondents to: _____
CLERK

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I Certify Under Penalty Of Perjury Under The Laws Of The
State Of Washington That The Foregoing Is True And Correct.

Signed in Seattle, WA this 7th day of March, 2008.

/s/

Linda Voss

*Original signature on file

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